FILE COPY

SEP 8 19

F. ROBERT SEAVER,

Supreme Court of the United States

October Term

70-5015

~~No. 5796~~

JON RICHARD ARGERSINGER,

Petitioner,

v.

RAYMOND HAMLIN,

Respondent.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF COMMONWEALTH OF VIRGINIA AMICUS CURIAE

ANDREW P. MILLER
Attorney General of Virginia

VANN H. LEFCOE
Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
ARGUMENT	2
CONCLUSION	5
CERTIFICATE OF SERVICE	6

TABLE OF CITATIONS

Cases

Tate v. Short, 401 U.S. 395 (1971)	3
Ex parte Garrison, 36 W.Va. 686, 15 S.E. 417 (1892)	8

Other Authority

Rules of Procedure for the Trial of Minor Offenses Before Magistrates, 400 U.S. 1037	4

Statutes

Ala. Code Title 15, § 327 (1948)	7
Alaska Stats. § 11.05.010	7
Ariz. Rev. Stat. Ann. § 13-1645	7
Ark. Stat. Ann. § 41.106	7
Cal. Penal Code § 19	7
Col. Rev. Stat. Ann. § 39-10-19 (1969 Supp.)	7
Ga. Code Ann. § 37-2506	7
Hawaii Rev. State. § 712-2	8
Idaho Code Ann. § 18-113 (1969 Supp.)	7
Ill. Ann. Stat. Ch. 38, § 1-7 (Supp. 1971)	7
Iowa Code Ann. § 687.7	7

Page

Kan. Gen. Stat. Ann. § 21-4502 (1970 Supp.) 7
Ky. Rev. Stat. Ann. 431.075 7
La. Rev. Stat. Titl. 15, Art. 303 7
Maine Rev. Stat. Ann. Title 15, § 1741 7
Mich. Comp. L. § 750.504 7
Minn. Stat. Ann. § 609.03 8
Miss. Code Ann. § 2562 (1967 Supp.) 7
Mo. Rev. Stat. § 560.605 7
Mont. Rev. Code Ann. § 94-116 7
Nev. Rev. Stat. 193.150 7
N.H. Rev. Stat. Ann. Sec. 607:14 (1970 Supp.) 8
N.J. S.A. 2A:85-7 7
N.M. Stat. Ann. § 40A-29-5 (Supp. 1969) 7
N.Y. Penal Law § 70.15 7
N.C. Gen. Stats. § 14-3 7
N.D. Code 12-06-14 7
Okla. Stat. Ann. Tit. 21, Sec. 10 7
Ore. Rev. Stat. § 161.080 7
R.I. Gen. Laws Ann. § 111-1-2 7
S.C. Code Ann. § 17-553 8
S.D. Comp. Laws Ann. Sec. 22-6-2 7
Tenn. Code Ann. § 39-105 (Supp. 1970) 7
Code of Virginia, § 18.1-109 7
Code of Virginia, §§ 19.1-347.1 - 19.1-347.5 7
Wash. Rev. Code Ann. § 9.92.020 7

Page

Wis. Stat. Ann. § 939.61 7

Wyo. Stats. § 6-7 8

Utah Code Ann. § 76-1-16 (Supp. 1969) 7

Supreme Court of the United States

October Term

No. 5798

JON RICHARD ARGERSINGER,

Petitioner,

v.

RAYMOND HAMLIN,

Respondent.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF COMMONWEALTH OF VIRGINIA AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The question presented for review in this appeal is whether due process requires the appointment of counsel for indigent persons in misdemeanor cases. The Supreme Court of Florida, from whose decision this appeal is taken, ruled that an indigent defendant must be advised of the right to court-appointed counsel in any case in which incarceration for more than six months would be possible upon conviction. Since the laws of the Commonwealth of Virginia do not provide for the appointment of counsel as a matter of right in misdemeanor cases, and since the majority of misdemeanor offenses in the Commonwealth carry potential jail terms of more than six months, the issues

presented in this case are of great importance to the people of Virginia.

ARGUMENT

It is the intention of the Commonwealth of Virginia as *amicus curiae* to stress to this Court the potential effects on the various States of the enunciation of a rule requiring the appointment of counsel by the State for indigent defendants in all misdemeanor cases where the possibility of incarceration exists. The most obvious effect, of course, would be upon the orderly and efficient administration of justice, since it can be anticipated that implementation of such a rule would mean more attorneys in more cases, which in turn would mean more time involved not only in the trial itself but in the setting of cases for trial, motions for continuance, appeals, habeas corpus actions (alleging, of course, ineffective counsel), etc. The use of law students and paralegal personnel, as suggested by petitioner, might alleviate such problems as they relate to any scarcity of lawyers, but would do nothing for the courts, clerk's offices, policemen, and other witnesses who would be required to spend more time than they already do now in over-crowded courts.

These obvious considerations, however, only scratch the surface of the problem. Petitioner insists that the bugbear of jammed dockets and foot-dragging justice is more apparent than real because many offenses do not *actually* carry the threat of imprisonment. It is true that some offenses such as jay-walking or sidewalk spitting either specify no jail term as punishment or if they do, such terms are rarely if ever imposed in lieu of or in addition to a small fine. Petitioner suggests that state legislatures and local governments could reclassify all such offenses to sort out those in which jail would not be a possibility, and that once this was done

the non-jail-potential cases could be processed separately from those requiring the presence of an attorney. Petitioner suggests further that the fine-only cases could be handled by non-judicial personnel.

These suggestions seriously overlook important practical considerations. Firstly, persons charged with traffic offenses which may result in loss of a driver's license or higher insurance rates quite often engage the services of counsel to fight the charges or simply to stall conviction for as long as possible. These cases cannot be handled either for the state or for the defendant by non-judicial personnel who are not lawyers. More importantly, however, many states still provide by statute for incarceration for nonpayment of a fine, and indeed, the threat of incarceration is as a practical matter the only realistic method for the enforcement of small fines, *Tate* v. *Short*, 401 U.S. 395 (1971) notwithstanding. That case held only that an *indigent* may not be *immediately* imprisoned for non-payment of a fine. It did not hold that a non-indigent scofflaw may not be jailed, nor did it prohibit the incarceration of any person of whatever solvency after alternative opportunities had been extended. While Virginia (as have presumably all of the States) has developed procedures for alternative methods of payment in the wake of *Tate* v. *Short, supra*,[1] any state which retained its jail-for-nonpayment statute would be hard pressed to argue that no possibility of incarceration exists in what might otherwise appear to be a fine-only case. Thus, the petitioner's suggestion for reclassification would require one further step, which he has either failed to anticipate or failed to suggest: repeal of the jail-for-nonpayment statutes. It cannot be doubted that such a step would result in a significant increase in the number of judgment-proof scofflaws.

From the foregoing it should be clear that only by accepting the principle that no offense can be considered petty, and that a day in jail is as long as a lifetime, can a rule requiring the appointment of counsel in every case where the threat of incarceration exists be justified, in view of the considerations outlined above which *must* result from such a rule. Indeed, this Court's Rules of Procedure for the Trial of Minor Offenses Before Magistrates, 400 U.S. 1037, promulgated January 27, 1971, make clear that some offenses are "petty" as opposed to "minor" and indicate that the appointment of counsel is not to be required in such cases. These petty offenses are those in which the maximum incarceration is six months.

Moreover, there are significant reasons for not tying the right to appointed counsel to any particular length of potential incarceration. It is respectfully submitted that the proper criterion should be the consequences of conviction rather than the possibility of jail, or in other words, misdemeanors as opposed to felonies. It is further submitted that while such civil disabilities as loss of the right to vote, disqualification from government service, etc. normally attach to felony convictions, no such consequences attach *by operation of law* to misdemeanor convictions. It may certainly be true that, as petitioner suggests, a poor man who goes to jail for more than a few days may lose his job, but he is just as likely to lose his job by reason of illness, strike, bankruptcy of his employer, or any of several other possibilities. To say that the state has deprived a man of his job because it sent him to jail is quite a stretch of the Constitution.

The reason for stressing this distinction is that different States have different maximum limits on punishment for misdemeanors, which in a majority of cases are or may be

longer than six months. A survey of the general misdemeanor statutes (punishment limits where not specifically provided by another statute) of the fifty States discloses the following maximum jail terms:

More than one year (3): Louisiana (two years);[2] New Jersey (three years);[3] North Carolina (two years).[4]

One year (20): Alaska,[5] Arkansas,[6] Colorado,[7] Georgia,[8] Illinois,[9] Iowa,[10] Kansas,[11] Kentucky,[12] Maine,[13] Missouri,[14] New York,[15] North Dakota,[16] Oklahoma,[17] Oregon,[18] Rhode Island,[19] South Dakota,[20] Tennessee,[21] Virginia,[22] Washington,[23] Wisconsin.[24]

Six months (9): Alabama,[25] Arizona,[26] California,[27] Idaho,[28] Mississippi,[29] Montana,[30] Nevada,[31] New Mexico,[32] Utah.[33]

Ninety days (4): Florida,[34] Michigan,[35] Minnesota,[36] Wyoming.[37]

Sentence in discretion of court (4): Delaware,[38] New Hampshire,[39] South Carolina,[40] West Virginia.[41]

No jail term authorized (2): Connecticut,[42] Hawaii.[43]

No general misdemeanor statute (8): Indiana, Maryland, Massachusetts, Nebraska, Ohio, Pennsylvania, Texas, Vermont.

It will be seen from this analysis that 27 states have statutes providing for possible incarceration of more than six months, and the same possibility may exist in the eight states which do not define misdemeanors in terms of maximum punishment.

CONCLUSION

It is respectfully submitted that unless and until misdemeanor convictions *per se* result in consequences to the individual growing out of the conviction itself, rather than out of the subjective circumstances of each defendant's life, the

right to court-appointed counsel should not attach, for the reasons stated heretofore.

COMMONWEALTH OF VIRGINIA

By ANDREW P. MILLER
Attorney General

ANDREW P. MILLER
Attorney General of Virginia

VANN H. LEFCOE
Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I certify that on or before the 8th day of September, 1971, I mailed by Airmail three copies of the foregoing Brief to J. Michael Shea, Esquire, P.O. Box 2742, Kennedy at Franklin, Tampa, Florida 33601; P. A. Hubbart, Public Defender, Justice Building, 1351 N.W. 12th Street, Miami, Florida; Bruce S. Rogow, Esquire, 622 N.W. 62nd Street, Miami, Florida 33150; and to The Honorable Robert L. Shevin, Attorney General of Florida, The Capitol, Tallahassee, Florida 32304. All parties required to be served have been served.

VANN H. LEFCOE
Assistant Attorney General

FOOTNOTES

[1] Code of Virginia, §§ 19.1-347.1 - 19.1-347.5.
[2] La. Rev. Stat. Titl. 15, Art. 303.
[3] N.J.S.A. 2A :85-7.
[4] N.C. Gen. Stats. § 14-3.
[5] Alaska Stats. § 11.05.010.
[6] Ark. Stat. Ann. 41-106.
[7] Col. Rev. Stat. Ann. § 39-10-19 (1969 Supp.).
[8] Ga. Code Ann. § 27-2506.
[9] Ill. Ann. Stat. Ch. 38 § 1-7 (Supp. 1971).
[10] Iowa Code Ann. § 687.7.
[11] Kan. Gen. Stat. Ann. § 21-4502 (1970 Supp.).
[12] Ky. Rev. Stat. Ann. 431.075.
[13] Me. Rev. Stat. Ann. Title 15 § 1741.
[14] Mo. Rev. Stat. § 560.605.
[15] N.Y. Penal Law § 70.15.
(Although New York distinguishes between Class A, Class B, and unclassified misdemeanors, since counsel is appointed in all cases New York's maximum Class A penalty is included for purposes of this illustration.)
[16] N.D. Code 12-06-14.
[17] Okla. Stat. Ann. Tit. 21 Sec. 10.
[18] Ore. Rev. Stat. § 161.080.
[19] R.I. Gen. Laws Ann. § 11-1-2.
[20] S.D. Comp. Laws Ann. Sec. 22-6-2.
[21] Tenn. Code Ann. § 39-105 (Supp. 1970).
[22] Code of Virginia, § 18.1-109.
[23] Wash. Rev. Code Ann. § 9.92.020.
(Although Washington distinguishes between gross misdemeanors and simple misdemeanors, which carry a maximum of 90 days, § 9.92.030, counsel is apparently provided for neither.)
[24] Wis. Stat. Ann. § 939.61.
[25] Ala. Code Title 15, § 327 (1958).
[26] Ariz. Rev. Stat. Ann. § 13-1645.
[27] Cal. Penal Code § 19.
[28] Idaho Code Ann. § 18-113 (1969 Supp.).
[29] Miss. Code Ann. § 2562 (1967 Supp.).
[30] Mont. Rev. Code Ann. § 94-116.
[31] Nev. Rev. Stat. 193.150.
[32] N.M. Stat. Ann. § 40A-29-7 (Supp. 1969).
(Although New Mexico has a maximum of one year for non-petty misdemeanors, that State also provides counsel in such cases.)
[33] Utah Code Ann. § 76-1-16 (Supp. 1969).
[34] Fla. Stat. Ann. § 775.07.
[35] Mich. Comp. L. § 750.504.

[36] Minn. Stat. Ann. § 609.03.
[37] Wyo. Stats. § 6-7.
[38] Del. Code Ann. Tit. 11, § 105.
[39] N.H. Rev. Stat. Ann. Sec. 607:14 (1970 Supp.).
[40] S.C. Code Ann. § 17-553.
[41] *Ex parte Garrison,* 36 W.Va. 686, 15 S.E. 417 (1892).
[42] Conn. Gen. Stat. Ann. § 54-195.
[43] Hawaii Rev. Stats. § 712-2.